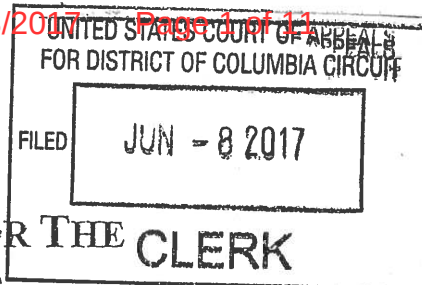


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UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT



University of Southern California,

Petitioner,

vs.

National Labor Relations Board,

Respondent.

Case No. 17-1149

**PETITION FOR REVIEW OF A DECISION AND ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

Petitioner University of Southern California hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the decision and order of the respondent National Labor Relations Board entered on June 7, 2017 (a copy is attached as Exhibit A), in cases 31-CA-178831 and 31-CA-192125, granting the General Counsel's Motion for Summary Judgment.

This petition is proper under 29 U.S.C. § 160(f) and Rule 15 of the Federal Rules of Appellate Procedure.

DATED: June 8, 2017

Cameron W. Fox

J. Al Latham Jr. (D.C. Cir. Bar No. 56184)  
Cameron W. Fox (D.C. Cir. Bar No. 56207)  
PAUL HASTINGS LLP  
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(213) 683-6000

*Attorneys for Petitioner  
University of Southern California*

**EXHIBIT A**

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

University of Southern California and Service Employees International Union (SEIU), Local 721.  
Cases 31-CA-178831 and 31-CA-192125

June 7, 2017

#### DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE  
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charges filed on June 20, July 14, and August 4, 2016, respectively, and a charge filed on January 26, 2017, by Service Employees International Union (SEIU), Local 721 (the Union), the General Counsel issued the consolidated complaint on February 9, 2017, alleging that University of Southern California (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 31-RC-164868. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On March 17, 2017, the General Counsel filed a Motion for Summary Judgment. On March 20, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and opposition to the motion for summary judgment, and the General Counsel filed a reply.

#### Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the certified unit is comprised of faculty who are managerial employees outside the coverage of the Act, and that the Board's Final Rule regarding the Board's election processes is invalid.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it shown any special cir-

cumstances that would require the Board to reexamine the decision made in the representation proceeding.<sup>1</sup> We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent has been a California corporation with an office and place of business in Los Angeles, California, and has been engaged in the business of providing higher education.

In conducting its operations during the 12-month period ending December 24, 2015, the Respondent derived gross revenues in excess of \$1 million and purchased and received goods and materials valued in excess of \$5000 directly from points located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. The Certification

Following the representation election held by mail ballot from January 13 through January 29, 2016, the Union

<sup>1</sup> In its response to the Notice to Show Cause and opposition to the Motion for Summary Judgment, the Respondent argues that special circumstances call for the reexamination of the decision in the underlying representation proceeding by a fully constituted five-member Board. The Respondent asserts that the representation decision contradicts representations the Board made to the Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and it overrules, sub silentio, post-*Yeshiva* jurisprudence. Because the arguments made in the opposition were or could have been raised in the underlying representation proceeding, we find that the Respondent has not shown special circumstances warranting relitigation of the representation case.

<sup>2</sup> Chairman Miscimarra would have granted review in the underlying representation proceeding, finding that the request for review raised substantial issues warranting review regarding the Regional Director's finding that the Respondent's nontenure track faculty are not managerial employees outside the coverage of the Act, as well as the Regional Director's denial of the Respondent's motion to reopen the record and for reconsideration. While he remains of that view, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

was certified on February 10, 2016,<sup>3</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

**INCLUDED:** All full-time and part-time non-tenure track faculty who are employed by the University of Southern California and who teach at least one credit-earning class, section, lesson, or lab within the academic unit known as the USC Roski School of Art and Design at the Employer's instructional facilities at the University Park Campus or at the Graduate Fine Arts Building, located at 3001 South Flower Street, Los Angeles, California 90007.

**EXCLUDED:** All tenured or tenure-track faculty; all faculty whose primary teaching responsibilities are within an academic unit other than the USC Roski School of Art and Design; all faculty whose primary area of practice and/or scholarship is outside the following areas: ceramics, critical studies, design, inter-media, painting and drawing, photography, printmaking, or sculpture; all faculty regularly employed by the Employer at any location other than the University Park Campus or the Graduate Fine Arts Building; all faculty teaching online courses exclusively (regardless of location); all emeritus faculty; all registrars and librarians; all Athletic Department coaches; all graduate students; all post-doctoral scholars; all lab assistants, graduate assistants, clinical fellows, teaching assistants, and research assistants; all mentors who do not have teaching responsibilities; all department chairs, regardless of their faculty status; all administrators, including those who have teaching responsibilities; the President of the University; the Provost; all Associate Provosts, Vice Provosts, and Vice Presidents; all Deans, Associate Deans and Assistant Deans, regardless of their faculty status; all non-faculty employees; all volunteers; all other represented employees; and all managers, supervisors, and guards as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

By letters dated April 7, 2016, and January 6, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about May 17, 2016, the Respondent has failed and refused to do so.

<sup>3</sup> On December 30, 2016, the Board (then-Member Miscimarra dissenting) denied the Respondent's Request for Review. 365 NLRB No. 11 (2016).

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since May 17, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, University of Southern California, Los Angeles, California, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Service Employees International Union (SEIU), Local 721 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

**INCLUDED:** All full-time and part-time non-tenure track faculty who are employed by the University of



## UNIVERSITY OF SOUTHERN CALIFORNIA

3

Southern California and who teach at least one credit-earning class, section, lesson, or lab within the academic unit known as the USC Roski School of Art and Design at the Employer's instructional facilities at the University Park Campus or at the Graduate Fine Arts Building, located at 3001 South Flower Street, Los Angeles, California 90007.

**EXCLUDED:** All tenured or tenure-track faculty; all faculty whose primary teaching responsibilities are within an academic unit other than the USC Roski School of Art and Design; all faculty whose primary area of practice and/or scholarship is outside the following areas: ceramics, critical studies, design, inter-media, painting and drawing, photography, printmaking, or sculpture; all faculty regularly employed by the Employer at any location other than the University Park Campus or the Graduate Fine Arts Building; all faculty teaching online courses exclusively (regardless of location); all emeritus faculty; all registrars and librarians; all Athletic Department coaches; all graduate students; all post-doctoral scholars; all lab assistants, graduate assistants, clinical fellows, teaching assistants, and research assistants; all mentors who do not have teaching responsibilities; all department chairs, regardless of their faculty status; all administrators, including those who have teaching responsibilities; the President of the University; the Provost; all Associate Provosts, Vice Provosts, and Vice Presidents; all Deans, Associate Deans and Assistant Deans, regardless of their faculty status; all non-faculty employees; all volunteers; all other represented employees; and all managers, supervisors, and guards as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respond-

ent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 7, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Service Employees International Union (SEIU),

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Local 721 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

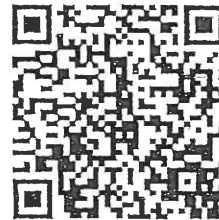
**INCLUDED:** All full-time and part-time non-tenure track faculty who are employed by us and who teach at least one credit-earning class, section, lesson, or lab within the academic unit known as the USC Roski School of Art and Design at our instructional facilities at the University Park Campus or at the Graduate Fine Arts Building, located at 3001 South Flower Street, Los Angeles, California 90007.

**EXCLUDED:** All tenured or tenure-track faculty; all faculty whose primary teaching responsibilities are within an academic unit other than the USC Roski School of Art and Design; all faculty whose primary area of practice and/or scholarship is outside the following areas: ceramics, critical studies, design, intermedia, painting and drawing, photography, printmaking, or sculpture; all faculty regularly employed by us at any location other than the University Park Campus or the Graduate Fine Arts Building; all faculty teaching online courses exclusively (regardless of location); all emeritus faculty; all registrars and librarians; all Athletic Department coaches; all graduate students; all post-

doctoral scholars; all lab assistants, graduate assistants, clinical fellows, teaching assistants, and research assistants; all mentors who do not have teaching responsibilities; all department chairs, regardless of their faculty status; all administrators, including those who have teaching responsibilities; the President of the University, the Provost; all Associate Provosts, Vice Provosts, and Vice Presidents; all Deans, Associate Deans and Assistant Deans, regardless of their faculty status; all non-faculty employees; all volunteers; all other represented employees; and all managers, supervisors, and guards as defined in the Act.

UNIVERSITY OF SOUTHERN  
CALIFORNIA

The Board's decision can be found at [www.nlr.gov/case/31-CA-178831](http://www.nlr.gov/case/31-CA-178831) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**CERTIFICATE OF SERVICE**

I certify I caused the foregoing Petition for Review Of A Decision And Order Of The National Labor Relations Board to be served on the parties listed below via U.S. First-class, postage pre-paid mail, and by electronic mail, this 8th day of June 2017.

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**BY US MAIL**

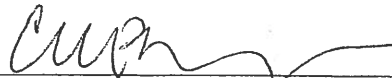
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C. Wendy Phinny



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UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUITUNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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University of Southern California,

Petitioner,

Case No. \_\_\_\_\_

vs.

National Labor Relations Board,

Respondent.

RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner University of Southern California, by its attorneys, Paul Hastings LLP, hereby states that it is a California not-for-profit public benefit corporation, and therefore there are no parent or publicly-held corporations that hold an ownership share in the University of Southern California.

DATED: June 8, 2017

Cameron W. Fox

J. Al Latham Jr. (D.C. Cir. Bar No. 56184)  
Cameron W. Fox (D.C. Cir. Bar No. 56207)  
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*Attorneys for Petitioner  
University of Southern California*

**CERTIFICATE OF SERVICE**

I certify I caused the foregoing Rule 26.1 statement to be served on the parties listed below via U.S. First-class, postage pre-paid mail this 8th day of June 2017.

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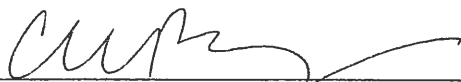
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C. Wendy Phinny